The Models of Constitutional Interpretation between the Constitutional Court of Indonesia and Japan: The Case of the Verdict Regarding Illegitimate Child*

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Abstract

The Constitutional Court of Indonesia issued a landmark judgment on February 2012 stipulating that the civil rights of children born out of wedlock should be recognized by their biological fathers. In June 2008, the Supreme Court of Japan issued a judgment that struck down the same issue stipulating that illegitimate child shall be acknowledged as having legal relationship with the father, and that the Nationality Act was violation of the constitution. These two judgments call comparative study on constitutional judgment and interpretation. In the specific area of constitutional interpretation, Vicki C. Jackson has argued that at least three models might broadly describe the relationships between domestic constitutions and law from trans-national sources. Firstly, the convergence model that assumes the desirability of convergence with the constitutional laws of other nations; secondly, the resistance model that relishes resistance by national constitutions from foreign influence; and the engagement model arguing that the constitution can best be viewed as a site of engagement with the trans-national, informed but not controlled by legal norms of other nations and questions they put to interpret their constitution. Based on the theory, the aim of this article is to see the models of interpretation of constitutional relationships between Indonesia and Japan while both nations give similar judgments on illegitimate child. This study will answer this question by integrating the interpretation of the judgments of The Constitutional Court of Indonesia and the Supreme Court of Japan on illegitimate Child. Hopefully, the result of this research paper may enlighten the context of constitutionalism in Asia.

Keywords: comparative, constitutionalism, engagement, illegitimate child, judgment.

Model Interpretasi Konstitusi di Indonesia dan Jepang: Tinjauan Kasus mengenai Putusan Anak yang Lahir di Luar Nikah

Abstrak

Pada Februari 2012, Mahkamah Konstitusi Indonesia memberikan putusan yang bersejarah yang mengatur hak perdata setiap anak yang lahir di luar nikah agar diakui oleh ayah biologisnya. Pada Juni 2008, Mahkamah Agung Jepang mengeluarkan putusan yang membatalkan permasalahan yang sama terhadap klausa dalam undang-undang nasional sebagai suatu pelanggaran atas konstitusi yang mengatur bahwa anak yang lahir di luar nikah harus diakui memiliki hubungan resmi dengan ayah biologisnya. Kedua putusan ini

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* Artikel ini telah dimuat dalam acara The 2013 Padjadjaran Legal Conference. Diselenggarakan oleh Fakultas Hukum Universitas Padjadjaran.

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memberikan studi komparatif dalam hal putusan konstitusi dan penafsirannya. Di dalam area spesifik mengenai penafsiran konstitusi, Vicki C. Jackson telah memberikan argumentasi bahwa sedikitnya terdapat tiga bentuk yang dapat menggambarkan hubungan antara konstitusi dalam negeri dan hukum dari sumber yang transnasional, yaitu: bentuk campuran yang menunjukkan adanya keinginan untuk mencampurkan hukum konstitusi nasional dengan negara lain; bentuk penolakan adanya pengaruh luar terhadap konstitusi nasional; dan bentuk penerimaan yang berpendapat bahwa konstitusi lebih baik dilibatkan secara transnasional, mengetahui tetapi tidak terpengaruh oleh pertimbangan norma hukum negara lain dan terhadap pertanyaan yang mereka ajukan mengenai konstitusi nasional secara spesifik. Dalam teori ini, penulisan ini bertujuan untuk mengetahui bentuk dari penafsiran hubungan konstitusi antara Indonesia dan Jepang sebagaimana kedua negara tersebut telah memberikan putusan dalam kasus anak yang lahir di luar nikah. Penulisan ini bertujuan untuk menjawab pertanyaan dengan meningkatkan pembacaan atas putusan Mahkamah Konstitusi Indonesia dan putusan Mahkamah Agung Jepang dalam kasus anak yang lahir di luar nikah. Semoga hasil dari penulisan penelitian ini dapat memberikan pencerahan terhadap konstitusionalisme di Asia.

Kata Kunci: anak yang lahir di luar nikah, hubungan, konstitusionalisme, perbandingan, putusan.

A. Introduction

Constitutionalism, as a borrowed concept from Western constitutional studies, is used on the evaluation of the development of constitutions in Asia without being clearly defined, and is merely applied to the constitutional text as a book. This study, therefore, considers it important to identify the actual modes of constitutionalism in Asia through empirical approaches to the practice of constitutional adjudication; for this purpose, this study will focus on the constitutional interpretation of engagement between The Constitutional Court of Indonesia and The Supreme Court of Japan.

More than 95 out of 188 member States of the United Nations made major amendments to their constitutions in 1989 and 1999 and at least 60 States adopted new constitutions. At least 92 countries have incorporated bills of rights, fundamental rights or some forms of individual and/or collective rights into their constitutional orders, while at least 70 of the state members of the UN had adopted some form of constitutional review. Many states have ratified a variety of international treaties and conventions on human rights as part of legal and judicial reform.[1] In the end, constitutional reconstruction in 1990s was very intense as the result of rule of law propaganda under the name of development.[2]

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1 Kevin E. Davis and Michael J. Trebilcock, "The Relationship Between Law And Development: Optimists Versus Skeptic's", *Law & Economics Research Paper Series*, Working Paper No. 08-24, 2008.

2 *Ibid.*, see also Carothers, *Promoting The Rule Of Law Abroad*, Carnegie International for Peace, 2006.

As mentioned, there is no definition of constitutionalism from leading scholars on constitutional study, especially in Asia. However, a quick review on prominent scholarly works will tell us that there are two contexts of Western legal thoughts incorporated in the discourse of constitutionalism, namely, the institutional or procedural protection against the dictatorship, and the substantive value of natural law.[3]

Carl Friederich emphasizes that constitutionalism requires separation of power, accountability of government, and protection of human rights.[4] In all of its successive phases, constitutionalism has one essential quality: it is a legal limitation on government, the antithesis of arbitrary rule.[5] Mark Tushnet argues that the components of constitutionalism include these following elements: encompassing commitment to the rule of law, a reasonably independent judiciary, and free and open election.[6] Daniel S. Lev describes constitutionalism as legal process that involves a political process, with or without a written constitution, more or less oriented to public rules and institutions intended to define and contain the exercise of political authority.[7] Lev's term of constitutionalism is beyond the discussion of merely institutional structure or a matter of the distribution of power and authority; its emphasis is on the process of binding political authority by legal rules.

Although this procedural requirement of rule of law is often considered as the product of Anglo-American, the civil law had been developing similar procedural control under the concept of "*rechtstaat*" or government by the law. The notion of constitutionalism, according to civil law, is very much connected with the concept "*rechstaat*" or government by the law.[8] Under the "*rechtstaat*" notion, State's action and administration shall be based upon the law and constrained by the law. The concept of constitutionalism under "*rechtstaat*" has prevailed in the practice of constitutionalism in civil law countries like Germany and Japan. Whereas in Indonesia, before the globalization of the rule of law, law students and constitutional law scholars were more familiar with the notion of "*rechtstaat*". Basically the notion of constitutionalism under the "*rechtstaat*" and supremacy of law share common idea and principle since both terms came from ancient German teachings.

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3 Stephen M. Griffin, "Constitutionalism in the United States', From Theory to Politics", *Oxford Journal of Legal Studies*, Vol. 10, No. 2, 1990, p. 202.

4 Miriam Budiardjo, *Dasar-dasar Ilmu Politik*, Jakarta: Gramedia, 1991.

5 Carl Schmitt, Max Weber, "Liberal Constitutionalism and its Critics", in *Constitutionalism and Democracy* written by Jon Elster (eds), United Kingdom: Cambridge University Press, 1989.

6 Mark Tushnet, "Comparative Constitutional Law", Cambridge: The Oxford Handbook of Comparative Law, 2006.

7 Daniel S. Lev, "Social Movement, Constitutionalism and Human Rights: Comments from The Malaysian and Indonesian Experiences in Constitutionalism and Democracy: Transition", in *The Contemporary World* written by Douglass Greenberg (eds), Oxford: Oxford University Press, 1993.

8 Hans Kelsen, *Teori Umum tentang Hukum dan Negara*, Bandung: Nusamedia & Nuansa, 2006.

On the other hand, there is another point of view on constitutionalism focusing on the substantive values to be attained through constitutional institution. Paul W. Kahn, for instance, added that constitutionalism is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order. At both the state and national levels, this debate focuses upon the ideas of liberty, equality, and due process of law as well as upon the structures of representative government necessary to realize these values.[9]

In addition, Mark Tushnet has also mentioned two similar elements of constitutionalism[10] in his recent publication. Tushnet shared his understanding that nowadays there are two dimensions[11] of recent studies on constitutionalism, namely institutional or governmental structure on one part,[12] and human rights[13] on the other. Tushnet,[14] first referred to institutional aspect which covers similar issues often discussed as a "thin" version of rule of law,[15] but then went into the overview of history of human rights often discussed as a "thick" version of rule of law. Constitutionalism therefore is very similar to the substantive rule of law or supremacy of the law, under the tradition of common law but not the same as the present formalistic definition of rule of law as promoted by World Bank.[17]

The rise of constitutionalism was followed by the gradual emergence and expansion of a new constitutional court in the world political system as part of the institutionalization of constitutional structure.[18] This seems to be a natural phenomenon, given the fact that the role of constitutional court has long been attributed to both of the aforementioned two dimensions of constitutionalism, namely, procedural and substantive goals. Mauro Cappeletti[19] for example, explained the role of constitutional court as the method to accentuate the positive attributes of

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9 Paul W. Kahn, "Interpretation and Authority in State Constitutionalism", *Harvard Law Review*, Vol. 106, No. 5, 1993, p. 1147-1168.

10 Mark Tushnet, *Loc. cit.*

11 Adrian Vermeule, "Hume's Second-Best Constitutionalism", *The University of Chicago Law Review*, Vol. 70, No. 1, 2003, p. 421-437.

12 Vicki Jackson, Mark Tushnet, *Comparative Constitutional Law*, Minnesota: Foundation Press, 2005.

13 Norman Dorsen (et.al), *Comparative Constitutionalism Case and Materials*, Thomson and West, 2003; see also Robert P. Kraynak, "Tocqueville's Constitutionalism", *The American Political Science Review*, Vol. 81, No. 4 , 1987, p. 1175-1195.

14 Mark Tushnet, *Loc. cit.*

15 David Trubek, *The Rule of Law in Development Assistance: Past, Present and Future, The New Law and Development: A Critical Appraisal*, Cambridge: Cambridge University Press, 2006.

16 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th Edition with new Introduction, 1915.

17 Legal Vice Presidency of the World Bank, *Initiatives In Law and Judicial Reform 2003*, The World Bank, 2003, p. 1-2.

18 Tate C. Neal (eds), "Why the Expansion of Judicial Power?", in *The Global Expansion of Judicial Power*, New York: New York University Press, 1995.

19 Mauro Cappelletti, "Judicial Review in Comparative Perspective", *California Law Review*, Vol. 58, No. 5, 1970, p. 1017-1053.

higher values expressed by constitutions, in addition to its role as an institutional pillar in the separation of powers. A reference was also made to the stream of scholars descending from Montesquieu[20] asserting that constitutional separation of powers is critically predicated on the existence of an independent constitutional adjudication.

The world has observed three waves of the spread of constitutional review. The first wave was the adoption of a Judicial Review into the US constitutional system and the constitutions of its constituent States. The second wave came soon after Hans Kelsen's[21] reconceptualization of constitutional review under special court, particularly after World War II, assuming that the legislature might make mistakes which constitutional review could rectify. During the third wave of democratization, a large number of countries, particularly in the post-Communist world, as well as new democracies was adopting the German type of constitutional court.[22]

Despite one view that constitutional review would be subjected to strong western influence[23] and that it would be difficult to fit with Asia's historical image of authoritarian regime,[24] the emergence of constitutional and judicial review has been well recognized and documented by constitutional law scholars in Asia.[25] There is a great deal of variance in East Asia. South Korea and Taiwan have emerged as conforming civil law countries with well-regarded constitutional courts. Indonesia appears to be heading towards this direction too, although Indonesian constitutionalism is still waiting for consolidation. Mongolia has, likewise, an active civil law constitutional court, though some might fear that this court has gone too active. Japan and Hong Kong reflect the opposites. The Hong Kong Basic Law stipulates that for reviewing matters respecting central authority and local/central relations by the Standing Committee of China's National People's Congress (NPC), seemingly centralized approach. At the same time, Hong Kong has decentralized common law review on other matters within Hong Kong's autonomy. Japan is a civil law country with a structurally decentralized system modeled like the United States'. The Philippines has long been a hybrid in legal system terms, although their constitutional judicial review is now modeled on the American common law system. While Japan has maintained the successful image of constitutionalism in Asia, a new

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20 Montesquieu, The Spirit Of The Laws; see also: Torsten Persson (et.al), Separation of Powers and Political Accountability, 112 Q. J. ECON. 1163, 1997; Martin Shapiro, Courts: A Comparative And Political Analysis, United States: University of Chicago Press, 1981.

21 Hans Kelsen, *Loc. cit.*

22 Tom Ginsburg, *Judicial Review in New Democracies*, Cambridge University Press, 2003.

23 Samuel Huntington, "After Twenty Years: The Future of The Third Wave", *Journal of Democracy* 8; see also Roberto Unger, *Law in Modern Society: Toward Criticism of Social Theory*, New York: Free Press, 1997, p. 3-12.

24 Derk Bodde and Clarence Morris, *Law in Imperial China*, Cambridge: Harvard University Press; see also Andrew J. Nathan, *Chinese Democracy*, Berkeley/Los Angeles: California University Press, 1967.

25 Tom Ginsburg, "Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan", *Law & Social Inquiry*, Vol. 27, No. 4, 2002, p. 763-799.

breed of constitutional court in Thailand[26] and Indonesia after the turbulent political situation in 1997, gives other possible prospects for future legal reform and constitutionalism in the region.

Constitutional adjudication thus expands the opportunities for engagement with foreign experience. There are reports that such references are increasing, under the influence of internationalization and globalization, including the evolution of supra-national arrangements. One influential scholar, Peter Haberle suggested comparative law as an additional interpretative technique. On the other hand, underlying theoretical assumptions, acquired habits of reasoning, and established practices continue to limit explicit engagement with comparative law, and continue to structure the way in which it occurs. Thus, Bryde reported that 'the German Constitutional Court has developed a style of reasoning where it basically cites only its own precedents'. In Argentina, where references to decisions of the Supreme Court of the United States have been a long-established feature of constitutional jurisprudence, scholars.[27]

The Constitutional Court of Indonesia issued a landmark ruling on February 2012 stipulating that the civil rights of children born out of wedlock should be recognized by their biological fathers. In June 2008, the Supreme Court of Japan issued a judgment that struck down the same issue upon a clause in the Nationality Act as being a violation of the constitution stipulating that illegitimate child shall be acknowledged as having legal relationship with the father. These two judgments call comparative study on interpretation of constitutional judgment.

Specifically, this study purports to ascertain the characteristic of the constitutionalism in Asian context through empirical analysis on the adjudication practice of constitutional interpretation at the Constitutional Court of Indonesia through judgment review, together with an attempt of comparative analysis on the practices of Japan in order to further identify Asian Constitutionalism characteristics. The author contends that constitutionalism in Asia takes place in a similar path pattern.[28] This similar pattern can be explained by assessing the engagement of constitutional interpretation by States.

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26 Erik Martinez Kuhonta, "The Paradox of Thailand 1997: People Constitution", *Asian Survey*, Vol. 48, Issue 3, 2008, p. 373–392.

27 Cheryl Saunders, "Judicial Engagement with Comparative Law", in *Comparative Constitutional Law* written by : Tom Ginsburg (eds), Cheltenham/Northampton: Edward Elgar, p. 578.

28 Bruce Ackerman, "The Rise of World Constitutionalism", *Virginia Law Review*, Vol. 83, No. 4, 1997, p. 771-797; see also Ran Hirschl, *Towards Juristocracy: The Origins And Consequences Of The New Constitutionalism*, Harvard: Harvard University Press, 2004.

While many comparative studies focus on institutional structure[29], and while much of the current discussion about constitutional interpretation has centered on how to reconcile judicial review with democracy defined as majority rule,[30] this study will go beyond that; For the purpose of assessing the engagement of constitutional interpretation, this study will focus on the practice of constitutional interpretation, while identifying both the institutional characteristics and the socio-legal cultural conditions enabling such functions. In order to consider the functional results of the different institutional design of constitutional courts, this paper observes not only the static structure of the constitutional court as a constitutional organ, but rather its dynamic institutional mechanisms, by looking into the development of living norms of the constitution via the "interpretation" of the constitution, as well as relevant laws concerning the legal culture and political environment.

B. The Constitutional Court of Indonesia

The Constitutional Court of Indonesia is one of many typical products amid the third wave of democratization. Until the introduction of The Constitutional Court of Indonesia, (hereinafter referred to as MK) in 2003; neither sense of rule of law, namely the procedural sense of *rechtstaat*, nor the substantive sense of democracy; was within reach of the Indonesian people. Indonesian constitutional doctrine is "Indonesia is *rechtstaat* but not *machtstaat* written in the constitution elucidation and constitutional books had never been realized. It is reasonable to assert that throughout Indonesian history, particularly at dictatorial rule period, constitutional law had been assigned a minor, marginal role. The main cause of the constitutionalism failures were the weaknesses of the 1945 Constitution and the absence of an institution for safeguarding the constitution.

Perhaps, as is often the case in the history of formation of any constitutional institutions, The Constitutional Court of Indonesia has its own historical moment involving political and economic crisis demanding substantial civic engagement. Therefore, a brief historical review of the formation of Indonesian constitution and its related institutions is the key to understanding the path led to the constitutional court.

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29 Neil K. Komesar, "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis", *The University of Chicago Law Review*, Vol. 51, No. 2, 1984, p. 366-446; see also: Lon L. Fuller, *The Morality Of Law*, New Haven: Yale University Press, 1969, p. 44; Brian Tamanaha, "The Lessons of Law and Development Studies", *American Journal of International Law*, 89 AM. J. INT'L L. 470, 1995; Rachel Kleinfeld, "Competing Definitions of the Rule of Law", in *Promoting The Rule Of Law Abroad* written by Thomas Carothers (eds), Carnegie International for Peace, 2006.

30 David Deener, "Judicial Review in Modern Constitutional Systems", *The American Political Science Review*, Vol. 46, No. 4, 1952, p. 1079-1099.

Indonesia's current constitution was written in August 1945 during the independence struggle and was only intended as an interim document. The constitution was an authoritarian one, despite also contained several articles on human rights that allowed for most of the "thinly conceived" rights essential for democratic politics, as well as social and economic rights such as those pertaining to education and work. Prior to its amendment, the 1945 Constitution had prevailed as the state constitution of The Republic of Indonesia for three periods,[31] namely in the early years of independence from 1945 to 1949, before subsequently superseded by the RIS Constitution and 1950 Provisional Constitution. The 1950 Constitution only lasted nine years before former President Soekarno, impatient with the turbulent experiment in democracy, re-imposed the 1945 Constitution. During the era of former president Soeharto up to its first amendment in 1999, the 1945 Constitution was used to underpin an authoritarian style of government through its vagueness.

During the above-mentioned three periods, different models of state administration were applied, although all of these were based on the same, unchanged text of the 1945 Constitution. In the early years of independence, the country adhered to liberal democracy with the parliamentarian governmental system, which differed from the governmental system envisaged in the 1945 Constitution.[32] During the later period, known as the "Old Order" era, the presidential governmental system was applied according to the 1945 Constitution completed by the establishment of the House of Representatives (DPR) and the People's Consultative Assembly (MPR). The democracy, which developed at the time was known as guided democracy. However, the "guided" aspect became so prominent that it tended to lead towards authoritarianism.

During the "New Order" era from 1966 to 1998, under former President Soeharto,[33] the 1945 Constitution constructed an executive-heavy governmental system that gave the President a strong power without checks and balances mechanism. It also gave the president an attributive and delegated power to regulate

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31 Indonesia's constitutional history started in 1945. Before the Declaration of Independence on August 17, 1945, the Preparation Committee for the Independence had started the drafting process of the constitution. The 1945 Constitution was then enacted on August 18, 1945. In 1949 due to negotiation with the Allied Forces, Indonesian territory was divided into small states under the 1949 Constitution of the United States of Indonesia. Afterward, in 1950 Indonesia gained its total freedom and the Contemporary Constitution of 1950 was enacted mandating the making of a more comprehensive permanent constitution to a Constitutional Assembly. However, the Constitutional Assembly was considered failed in 1959 so that President Sukarno declared to go back to the 1945 Constitution. From July 1959 to August 1999, the 1945 Constitution remained in place. In 1999 to 2002 amendments were made. Although major changes have been made in the four amendments, the current constitution is officially called "the 1945 Constitution".

32 Ikrarnusa Bhakti, "The Transition To Democracy In Indonesia: Some Outstanding Problems", *Paper Presented at The Transition Towards Democracy in Indonesia Conference*, Jakarta-Indonesia, 18 October 2002.

33 Ibid.

constitutional and fundamental affairs merely with the laws or governmental decree since so many provisions in the constitution gave the instructional to be regulated by law and subsequently regulated with more detail in subsequent governmental decree. One clear example is the General People Assembly (MPR), which was the highest organ within Constitutional Order, arranged for the benefit of the president through the Law on MPR and DPR Membership.[35] By this Law, the president appointed 440 MPR members, consisting of 100 members from Army and individuals, and 340 from delegation of groups; 160 members came from regional representatives elected by the Regional House of Representatives (DPRD); and 400 members were elected through general election. This shows the domination of the president over the MPR. In addition, the law making was also dominated by the ruling president because the main power of the law making was in the hands of the president and the president's supporting party dominating the DPR.[36]

Many laws in that era were substantively unconstitutional, but could only be changed through legislative review by DPR itself. Last, but not least, some provisions or articles in the 1945 Constitution were vague or ambiguous norms that could be interpreted in various ways in accordance to the policy of the president. Besides that, the abuse of power often led to human and constitutional rights violations without any measures for constitutional appeal.

A result of this lack of effective channels for the realization of constitutional provisions was the general neglect of the constitution as a normative source. A dominant tendency in Indonesian academy was the European tradition of the first half of the 20th century, which saw the constitution as a mere assortment of policy programs that could never materialize without addressing the actions of the legislation or administrative actions.[37]

In addition, the New Order's hot pursuit of economic development and stability had led the government to consider that human rights and the rule of law were dispensable in pursuit of economic development, thus putting aside the constitutionalism after the economic development and stability. Therefore, during the New Order period, the existence of written constitution did not make the Indonesian people feel a procedural or substantive sense of constitutionalism.

All those experiences and the weaknesses of the 1945 Constitution were the considerations that led to the establishment of the Constitutional Court as one of

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34 Article 2 (1) of 1945 Constitution of The Republic of Indonesia (pre-amendment).

35 Law No. 16 Year 1969, Law No. 5 Year 1975, Law No. 2 Year 1985, and Law No. 5 Year 1995 on MPR and DPR Membership.

36 Article 5 of 1945 Constitution of The Republic of Indonesia (pre-amendment).

37 Bagir Manan, *DPR, DPD, dan MPR dalam UUD Baru*, Yogyakarta: FH UII Press, 2004; see also Jimly Asshiddiqie, *Format Kelembagaan Negara dan Pergeseran Kekuasaan dalam UUD 1945*, Yogyakarta: FH UII Press, 2004.

judicial power executors alongside the Supreme Court. The establishment of constitutional court was regarded as one of the largest constitutional reforms in Indonesia after the fall of former President Soeharto in 1998.[38] His successor, former President Habibie, apparently already thought about the need for constitution amendment and direct election for presidency. Habibie said that the future of Indonesian democracy lies in the constitution amendment so that Indonesia can stand firm together with other democratic nations without losing its own identity.[39]

Finally, the provisions regarding Constitutional Court, together with those on the Judicial Commission, were included into the constitution during the third amendment in 2001. The amendments to the 1945 Constitution,[40] aimed at the realization of a democratic constitutional state based on the principle of constitutional supremacy, may be facing the same fate as the 1945 Constitution, unless there is a constitutional control mechanism, which guarantees the implementation of the constitution in the life of people, the nation, and the state.

With the establishment of the Constitutional Court within the system as part of the judicative power, two branches of judicial power under Supreme Court and Constitutional Court are also established in Indonesia. Constitutional adjudication in Indonesia follows the path of civil law pattern by establishing the centralized *Kelsenian* model of constitutional court outside of the regular judicial establishment.[41] By this system, constitutional court is seen as the independent branch of judicial power beside the Supreme Court, though with different jurisdiction.[42] As one of the pillars of judicial power, Indonesia Constitutional Court independency has been guaranteed by Article 24 (1) of Indonesian 1945 Constitution.[43]

Pursuant to Article 24C of the 1945 Constitution, the Constitutional Court has four authorities, namely:

1. Conducting judicial review to ensure that laws are in compliance with the Constitution;
2. Making decisions in disputes related to the authority of state agencies the authority of which bestowed by the Constitution;
3. Making decisions on the dissolution of political parties; and
4. Resolving disputes related to the results of general elections.

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38 Valina Singka Subekti, *Menyusun Konstitusi Transisi*, Jakarta: Rajawali Press, 2008.
39 *Ibid.*
40 *Ibid.*
41 Ginsburg, *Judicial Review in New Democracies*, *Op.cit.*, p. 9.
42 Article 24 (2) of 1945 Constitution of The Republic of Indonesia (third Amendment).
43 The judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice.

The law reviewing of jurisdiction of Indonesian Constitutional Court as abstract review. The abstract review allows for court proceedings that are concerned solely with the constitutionality of statutes, regardless of their application in an individual case. Still, the petition shall show the relation with how the constitutional right has been impaired by the law enactment. Such jurisdiction does not involve concrete review arising from individual case as American experience or constitutional complaint as regularly conducted in Germany.

After its establishment, Constitutional Court of Indonesia has recorded so many cases encompassing politically related case to constitutional rights-related cases. Until the end beginning of 2010, the Constitutional Court had handled 238 constitutional review cases from 114 different laws.[44] Many of the petitions for constitutional review were granted, which means that part of the law was unconstitutional. These constitutional reviews involved many kinds of constitutional review of law, most of them were related closely with the breach of rights provision provided in constitution.

C. Illegitimate Child Judgment by Indonesia Constitutional Court[45]

Constitutional Court Decision No. 46/PUU-VIII/2010 adjudicating constitutional cases, passed a decision in the case of petition for constitutional review of Law No. 1 of 1974 on Marriage to the Constitution of the Republic of Indonesia Year 1945. The decision of Constitutional Court to grant a judicial review of Marriage Act (Act 1 of 1974) filed by Hj. Aisha binti H. Mochtar aka Machica Mochtar who pleaded that his son Ibrahim Ramadan Muhammad Iqbal bin Moerdiono be recognized as the son of the late former Secretary of State Moerdiono.

Table 1.
Contested article in the judgment

1945 Constitution	Marriage Law
Article 28 B v. 1 **"Every person is entitled to form a family and pursue a legitimate descendants through marriage"**	Article 2, paragraph 2 "Every marriage is recorded in accordance with the legislation in force"
Article 28 B v. 2 **"Every child is entitled to survive, grow, and grow and be entitled to protection from violence and discrimination"**	Article 43 paragraph 1 "Children born out of wedlock only have civil relationship with his/her mother and his/her mother's family"
Article 28 paragraph 1 **"Everyone is entitled to recognition, security, protection, and fair legal certainty and equal treatment before the law"**	

44 Constitutional Court of The Republic of Indonesia Official Website, http://www.mahkamahkonstitusi.go.id/index.php?page=website_eng.RekapitulasiPUU, accessed on 28 April 2010.

45 Judgment No. 46/PUU-VIII/2010 of Constitutional Court of The Republic of Indonesia.

Constitutional Court only gave the decision accepting partial application. Article 2 paragraph 2 of the Marriage Law was not granted because the recorded marriage was aimed to achieve administrative order. General explanation of Marriage Law states that "*... a marriage is legal if carried according to the law of each religion or belief, and in addition, each marriage must be recorded in accordance with the legislation in force. Registration of every marriage is the same as recording important events in one's life, such as birth, death stated in paperwork, a deed which is also included in the list of records*". Based on the explanation of the Law 1/1974, MK concluded that (i) registration of marriage is not a factor in the validity of the marriage, and (ii) the recording is an administrative obligations required under the legislation.

The legal importance of administrative registration on marriage, according to the MK, could be seen from two perspectives. First, from the perspective of the state, registration is required as the actualization of state function to assure the protection, development, enforcement, and fulfillment of human rights. These are the responsibilities of the state in accordance to the democratic rule of law principles set forth in constitution [vide Article 28I paragraph (4) and paragraph (5) of the 1945 Constitution]. If the registration is regarded as a limitation, it is not inconsistent with constitutional provisions, as the limitation is prescribed by the Law and conducted with the sole purpose to secure recognition and respect for the rights and freedoms of others, and to meet the demands of justice in accordance with moral judgments, religious values, security and public order in a democratic society [vide Article 28J paragraph (2) UUD 1945]. Second, the administrative registration carried by the state is intended to give legal evidence in the future, so the protection and service associated with the rights arising from a marriage in question can be guaranteed effectively and efficiently. Thus, by the authentic evidence, the rights arising as a result of marriage can be protected and served well.

MK considered that main legal issue regarding children who are born out of wedlock is about the legal meaning of the phrase "*born out of wedlock*". Naturally, it is impossible for woman to be pregnant without the encounters of ovum and spermatozoa that will lead to conception either through sexual intercourse or through other means based on technological developments. Therefore, it is inaccurate and unfair, that the law requires that a child born from a pregnancy because of sexual relations outside of marriage only has a relationship with the woman as the mother. It is not right and not fair if law relieves man, who commits to sexual relationship leading to pregnancy and childbirth, from responsibilities as a father; thus, negate the rights of the children toward the father.

Legal consequences of the child birth because of pregnancy, as result of a sexual relationship between female and male, are legal relationship encompassing the rights and duty of the child, mother, and father. Based on the above description, the

relationship between children and father is not solely based on wedlock, but can also be based on the availability of proof of blood relationship between the child and the man as a father. Thus, regardless the question of marriage procedures/administration, every child should get legal protection. If not so, then the children born out of wedlock will be aggrieved, as the child is not guilty because of his/her birth out of his/her will. Child born without a clear status of his/her father often gets an unfair treatment and stigma in the middle of the society. Law should provide protection and fair legal certainty on the birth status of a child and the rights therein, including children born out of wedlock.

MK considered that based on the description above, Article 43 paragraph (1) of Law 1/1974 which states, "*A child who was born out of wedlock only have civil relationship with her mother and her mother's family*" should be revised into *"children born out of wedlock have a civil relationship with his/her mother and his/her mother's family and the male as the father as long as can be evidenced having blood relations by science and technology and/or other devices in accordance with the law, including civil relationship with his/her father's family".*

D. Unconstitutionality of Japan Nationality Law (Japan-Constitution Art. 14)[46]

On June 4, 2008, the Grand Bench of the Supreme Court of Japan ruled that Article 3, paragraph 1 of the Nationality Law (before amendment in December, 2008) allowing an illegitimate child who was born to a Japanese father and a non-Japanese mother, and is acknowledged by his/her father after his/her birth to acquire Japanese nationality through a notification only when he/she has obtained status as a legitimate child as a result of the marriage of his/her parents (when legitimation has occurred), violated Article 14, paragraph 1 of the Japanese Constitution, and that Japanese nationality should be granted to the appellants (plaintiffs) who have satisfied the requirements apart from the legitimation requirement prescribed in Article 3, paragraph 1 of the Nationality Law.[47] This judgment is worthy of attention in two aspects, namely: that it was the eighth case in the history of Japanese judicial review where the Supreme Court declared the relevant provision unconstitutional; and that the Supreme Court expressed a certain view determining that judicial remedies could be given. Twelve of the fifteen judges ruled in favor of the plaintiffs.[48]

The Tokyo District court had previously ruled that Japanese nationality should be conferred upon the children and that the article in the Nationality Law preventing

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46 "Judgment in Major Judicial Decision: Developments in 2008", *Waseda Bulletin of Comparative Law*, No. 28, 2008.

47 Akihiro Otake, "Constitutionality of Article 3, Paragraph 1 of the Nationality Law and Judicial Remedies", J. Aomori University Health Welf 11:1-19, 2010.

48 AJWRC, "Supreme Court Finds Discrimination against Children Born out of Wedlock Unconstitutional", *WOMEN'S ASIA 21, Voices from Japan*, No. 21, 2008, p.32.

them from being granted citizenship was unconstitutional;[49] this ruling, however, was later overturned by the Tokyo High Court, which rejected the claims of the plaintiff, asserting that the Court did not have the authority to grant citizenship because the "decision to grant citizenship is an inherent right of the state."[50]

Japan's nationality law, which in the past had specified that Japanese nationality could be passed to children only through the paternal line, was amended in 1984 so that either of a child's parents could pass on Japanese nationality. However, the amended law specified that if the mother is a foreigner, the Japanese father must recognize the paternity of the child before the child's birth; if the child's paternity is recognized by the father after the child is born, then the parents need to get married in order for the child to gain conferred Japanese nationality. The Japanese government has maintained that this provision is necessary because marriage would encourage cohabitation of the father and child and that this would help the child developing a sense of connection with Japan.[51]

The judgment began by considering the substantive aspect of the case as to whether the requirement of legitimacy under Article 3 (1) of the Nationality Act had a discriminatory effect against children acknowledged by their father after birth without the parents being married. The court was in favor of the opinion deciding the requirement for acquiring or loss of nationality is mandated to legislative discretion considering the history, tradition and political, economic or social circumstances of the country as provided by Article 10 of Constitution.[52] However, this power should be restricted by the equal protection principle under Article 14, which provides equal protection before the law and prohibits any unreasonable discriminations that do not have a rational basis related to the nature of things.

The court understood that the nationality law is mainly based on the concept of blood, a principle that legally formal marriage and the status of children whose parents are in such a preferable relationship should be primarily respected. Moreover it was a legitimate measure to require some kind of relationship with this country for children who hopes to be Japanese. However, the court must consider recent changes that delivered diversity in the way of family planning which has shifted the concept of marriage as preferable into one of many options. Therefore we could not say that the requirement of the marriage of parents has relevance with the purpose of the law that takes a balance between the principle and exception.[53]

Presiding Justice Niro Shimada determined that this provision may have had a basis at the time the law was first amended; however, considering the change in public

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49 See detail at: http://www.courts.go.jp/english/judgements/text/1997.10.17-1996.-Gyo-Tsu-.No.60.html
50 *Ibid.*
51 *Ibid.*
52 Article 10 of Constitution of Japan.
53 *Ibid.*

consciousness and the current reality of many families he declared that it was no longer appropriate to evaluate a child's connection with the country based on his or her parents' marital status. Thus, Justice Shimada ruled that there was no longer any rational basis for this provision in the Nationality Law and that when the plaintiffs had first been denied Japanese nationality in 2003 and 2005, this had been a case of groundless discrimination and thus a violation of Article 14 of the Japanese Constitution, which guarantees equality under the law.[54]

In the light of the significance of nationality as qualification for the protection of human rights, we think children whose mothers are foreign have suffered from discrimination to an unreasonable measure. The court concluded that Article 3 was in violation of constitutional equality under Article 14 (1). The court added that even in due respect to the direction of legislation, the court could not find a reasonable relationship between the purpose and measure requiring parental marriage as the condition necessary for being Japanese.[55]

On the matter upon whether the Court had the power to grant the appellant Japanese nationality on the premise that the differential treatment under Article 3(1) of the Nationality Law was unconstitutional. The majority judgments considered it necessary to remedy the unreasonably discriminatory treatment against illegitimate children acknowledged by their father after birth, having regard to the constitutional principle of equal treatment under law and the fundamental principles of nationality law. As a result, it reached the conclusion that there was no option but to apply Article 3(1) equally to allow children to acquire nationality after birth once they are acknowledged by their Japanese father.[56]

Judge Yokoo, Judge Tsuno, and Judge Furuta, in their joint dissenting opinion argued that illegitimate children cannot be granted nationality merely upon acknowledgment of their father, as there was no provision that would allow this. The whole purpose of Article 3(1) was to grant nationality to the children legitimated after birth, although premised upon acknowledgment by their father. Therefore, they argued, this provision would have become nonsense if it was applied without the requirement of legitimation. From this standpoint, the majority judgments were seen as granting nationality without legislative basis.[57]

The other dissenting judges, Judge Kainaka and Judge Horikago, emphasized that the law was to create legal qualification for Japanese Nationality from the beginning. The fact that the law did not provide recognition in some cases was not denial of them. Therefore the problem in this case should be the non-existence or lack of statutory law. What unconstitutional was not the surplus condition of parental

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54 *Ibid.*
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*

marriage but the lack of provision enabling children to be Japanese citizens without such condition or by showing their relationships with the country otherwise. Both dissenting justices concluded that expanded interpretation was impossible.[58]

E. The Engagement of Constitutional Interpretation

The general idea of constitutional interpretation is that the interpretation of constitutional provision should be based on the experience of our own constitution. Thus, an important source of the Constitution's legitimacy, and hence of constitutional review, is our experience of it as ours. To retain legitimacy, constitutional decisions interpreting the Constitution must be based in our interpretive traditions. Foreign law cannot, by itself, represent what is "*deeply rooted in this Nation's history and tradition. However the globalization has made a borderless world and shared universal value among States, in addition to the similar path of legal system tradition*".

Vicky C. Jackson[59] suggested three models that might broadly describe the relationships between domestic constitutions and law from trans-national sources. These three models are convergence model, resistance model, and engagement model. The Convergence Model sees national constitutions as sites for implementation of international law or for development of transnational norms. Constitutions can also provide a basis for resistance to, or differentiation from, foreign law or practice. Third, constitutional law can be understood as a site of engagement between domestic law and international or foreign legal sources and practices. On this view, the interpreters of the constitution do not treat foreign or international material as binding, or as presumptively to be followed, neither do they put on blinders that exclude foreign legal sources and experience. Trans-national sources are seen as interlocutors offering a way of testing the understanding of one's own traditions and possibilities by examining them in the reflection of others. In this article, engagement shall not be understood as the conscious knowledge of foreign constitutional idea, but also the similar practice of constitutional interpretation as a result of the similar factor governing the constitutional interpretation.

The engagement with comparative law can be explained by reference to the context in which constitutional adjudication occurs, including the procedures for adjudication and local understanding of the nature of constitutional interpretation. Context, thus understood, also to enlighten the ways in which comparative experience comes to the attention of the court so as to be included in the formulation of constitutional reasons. This section shows that there are features of engagement

58 *Ibid.*

59 Vicky C. Jackson, "Constitutional Comparisons: Convergence, Resistance, Engagement", *Harvard Law Review*, Vol. 119, p. 109.

for constitutional review between Indonesia and Japan. There are two main features of reason why the engagement occurred between Indonesia and Japan: First, an explanation of engagement between two countries can be attributed in part to the characteristics of constitutions themselves, which in turn affects the kinds of questions raised in constitutional adjudication. Constitutional issues are *sui generis* and many parts of most constitutions are expressed with a degree of generality. The types of issues raised are unlikely to be confined to questions of textual interpretation of the relatively straightforward variety found in connection with the application of many statutes. Both judgments in this paper come out from the general provision of equality clause. This general provision in this context is regarded as universal principle and is interpreted almost similarly in both countries. Thus, the generality of constitutional provision influences greatly the possibility of engagement of constitutional interpretation. Second, the shared tradition of civil law between Indonesia and Japan greatly influences the interpretative style of the judge. In this context, the determination of legal questions relies to a greater extent on deduction from a written, legislated text as the source of the general law. These features of civilian adjudication, in turn, affect the form and substance of judicial reasons for decision. Judges necessarily reach beyond legislated texts in search for solutions to legal problems that are not covered by them, in ways that demand creativity and potentially enhance the engagement with foreign legal experience.

F. Conclusion

The engagement of constitutional interpretation between Indonesia and Japan is a story of similar interpretation upon the constitutional rights. The judgment may be different in some parts but it is substantively similar. The similar interpretation on child constitutional rights tell us the possibility of shared values between Indonesia and Japan. It is legally logical considering the factor of universality of the value of constitutional rights reinforced by the influence of legal tradition between the two countries. Finally, this comparative study sheds lights upon the universal characteristics of constitutional rights in Asia.

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